

**PETITION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

UNITED STATES DISTRICT COURT		District MASSACHUSETTS	
Name of Movant JOSE MEDINA		Prisoner No. 22539 038	Case No. 99 10140
Place of Confinement FEDERAL MEDICAL CENTER DEVENS 11380		2004 106 -6 P 12: 26	
UNITED STATES OF AMERICA		V. JOSE MEDINA (name under which convicted)	
MOTION			
1. Name and location of court which entered the judgment of conviction under attack <u>UNITED STATES</u>			
<u>DISTRICT COURT</u> <u>DISTRICT OF MASSACHUSETTS</u> <u>BOSTON MASSACHUSETTS</u>			
2. Date of judgment of conviction <u>AUGUST 9 2000</u>			
3. Length of sentence <u>121 MONTHS</u>			
4. Nature of offense involved (all counts) <u>CONSPIRACY TO DISTRIBUTE COCAINE, POSSESSION OF COCAINE</u> <u>WITH INTENT TO DISTRIBUTE, TWO COUNTS, DISTRIBUTION OF COCAINE, UNLAWFUL USE OF</u> <u>COMMUNICATION FACILITY</u>			
5. What was your plea? (Check one)			
(a) Not guilty <input checked="" type="checkbox"/> <input type="checkbox"/> X			
(b) Guilty <input type="checkbox"/>			
(c) Nolo contendere <input type="checkbox"/>			
If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: <u>NOT APPLICABLE</u> _____ _____ _____			
6. If you pleaded not guilty, what kind of trial did you have? (Check one)			
(a) Jury <input type="checkbox"/> X			
(b) Judge only <input type="checkbox"/>			
7. Did you testify at the trial? Yes <input type="checkbox"/> X No <input checked="" type="checkbox"/>			
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> X No <input type="checkbox"/>			

**PETITION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

UNITED STATES DISTRICT COURT		District MASSACHUSETTS	
Name of Movant JOSE MEDINA		Prisoner No. 22539 038	Case No. 99 10140
Place of Confinement FEDERAL MEDICAL CENTER DEVENS 11380			
UNITED STATES OF AMERICA		JOSE MEDINA (name under which convicted)	
MOTION			
<p>1. Name and location of court which entered the judgment of conviction under attack <u>UNITED STATES</u></p> <p><u>DISTRICT COURT DISTRICT OF MASSACHUSETTS</u> <u>BOSTON MASSACHUSETTS</u></p> <p>2. Date of judgment of conviction <u>AUGUST 9 2000</u></p> <p>3. Length of sentence <u>121 MONTHS</u></p> <p>4. Nature of offense involved (all counts) <u>CONSPIRACY TO DISTRIBUTE COCAINE, POSSESSION OF COCAINE</u> <u>WITH INTENT TO DISTRIBUTE, TWO COUNTS, DISTRIBUTION OF COCAINE, UNLAWFUL USE OF</u> <u>COMMUNICATION FACILITY</u></p>			
<p>5. What was your plea? (Check one)</p> <p>(a) Not guilty <input checked="" type="checkbox"/> <input type="checkbox"/> X</p> <p>(b) Guilty <input type="checkbox"/></p> <p>(c) Nolo contendere <input type="checkbox"/></p> <p>If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: <u>NOT APPLICABLE</u></p>			
<p>6. If you pleaded not guilty, what kind of trial did you have? (Check one)</p> <p>(a) Jury <input type="checkbox"/> X</p> <p>(b) Judge only <input type="checkbox"/></p> <p>7. Did you testify at the trial? Yes <input type="checkbox"/> X No <input checked="" type="checkbox"/></p> <p>8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> X No <input type="checkbox"/></p>			

9. If you did appeal, answer the following:

(a) Name UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

(b) Result JUDGMENT AFFIRMED

(c) Date of result AUGUST 27 2003

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any federal court?

Yes No

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court NOT APPLICABLE

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes No

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No
(2) Second petition, etc. Yes No

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (h) Denial of right of appeal.

A. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCE
 Ground one:

Supporting FACTS (state *briefly* without citing cases or law)

EXHIBIT A ATTACHED

B. Ground two: SENTENCE WAS IMPOSED IN VIOLATION OF MY SIXTH AND FIFTH AMENDMENT RIGHTS TO BE MADE AWARE OF ALL THE CHARGES AGAINST ME, TO HAVE ALL CHARGES PRESENTED TO A JURY OF MY PEERS AND ESTABLISHED BEYOND A REASONABLE DOUBT AS SET FORTH BY THE UNITED STATES SUPREME COURT IN THEIR APPRENDI AND BLAKELY DECISIONS.

SEE EXHIBIT B ANNEXED

C. Ground three:

Supporting FACTS (state *briefly* without citing cases or law)

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

THE CLARIFICATION OF THE APPRENDI RULES WERE NOT SET FORTH PREVIOUSLY AS IT
WAS JUST DECIDED IN JUNE.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____ **PAUL J. HALEY**
460 WEST MAIN STREET
HILLSBORO NEW HAMPSHIRE 03244

(e) On appeal RALPH J PERROTTA

163 ARNOLD AVENUE CRANSTON, RHODE ISLAND 02905

(f) In any post-conviction proceeding NONE

(g) On appeal from any adverse ruling in a post-conviction proceeding
NONE

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

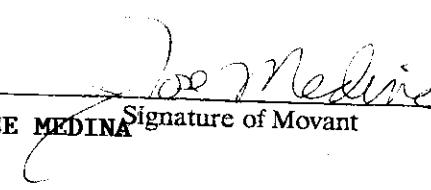
Wherefore, movant prays that the Court grant petitioner relief to which he or she may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

JULY 27 2004

(Date)


JOSE MEDINA _____
Signature of Movant

U S A V. JOSE MEDINA

EXHIBIT A INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCE

I retained Paul S Haley,Esq. , who held himself out to be experienced and an expert in the representation of defendants in the federal criminal justice system, and in sentencing matters to represent me in the sentence phase of my trial. It is my claim that he provided totally ineffective assistance at this stage of the proceedings which resulted in the imposition of a significantly more severe sentence than would have been imposed if I had been properly represented. A copy of the August 9,2000 "Disposition: transcript is annexed as Exhibit C. Even a quick reading will demonstrate the total unpreparedness and inassistance of counsel at the hearing. This issue was raised in the brief submitted on my direct appeal, but the Circuit Court in a footnote at page 14 of its opinion stated that ineffective assistance claims must first be presented to and ruled upon by the District Court in an 18 USC 2255 motion before they will consider them.

It is my claim that his representation rose to the level of ineffectiveness set forth in STRICKLAND V WASHINGTON ,466 U S 668 and that I am entitled to relief. I annex a copy of that part of the brief submitted on my behalf to the Court of Appeals as Exhibit D. I could not hope to present the issues as well as my appellate counsel did in the brief.

As the transcript demonstrates the Probation Department,which is routinely presumed by the courts to have the expertise and experience to properly analyze the facts and circumstances of criminal cases and to recommend appropriate sanctions,reported that I should only be held responsible for two sales,ie. 1 kilogram on 3/30 and 252 grams on 12/23. The government objected and demanded that I be held responsible for a significantly larger weight of drugs sold on multiple occasions to Edward Giangiari (TR 3,4). Mr. Giangiari had testified at my trial and mentioned only the two transactions cited by the Probation Department in it P S I Report. The government based its

objections on a "debriefing report" of Mr. Giangiari which had not been presented at trial in which he recited transactions in addition to those testified to at trial. If he had testified to these transactions at trial I would have been able to discredit these statements as patently false both on cross examination and by the testimony of a third party. The Judge indicated that he would accept the government's offer of proof but gave my attorney an opportunity to require Mr. Giangiari to testify and to be confronted if I challenged the truth of the report (TR8). My attorney elected not to require his testimony (TR 9,10). This was a totally unexplainable and inexcusable error. It cannot be dismissed as a trial tactic since the court had stated that it would accept the statement as true and proof of the other transactions. My only hope was to discredit this witness which I believe that we could do since I was not in the area when some of the claimed transactions took place. In any event I would be no worse off if our cross examination failed to convince the Judge that the statement was a fabrication designed to win favor with the arresting officers and perhaps even prompted by them. Based upon his trial testimony Jose Vazquez, another witness that he stated it had available in court, would have contradicted any transactions reported in the debriefing which allegedly involved him. My attorney did not require his testimony either.

Given all the circumstances the sentence imposed should be vacated and corrected.

U S A V JOSE MEL .A

EXHIBIT B

VIOLATIONS OF SIXTH AND FIFTH AMENDMENT PROTECTIONS

My constitutional rights pursuant to the sixth and fifth amendments to the United States Constitution ie. to be advised of the charges against me,to have any claimed criminal acts or omissions presented to a jury of my peers to determine guilt or innocence and to have any such charges established beyond a reasonable doubt - were all violated at the time of my trial and sentence. The Supreme Court has recently reaffirmed these rights and made it clear that the government must recognize these rights and meet its burdens or any sentence pronounced in violation of these rights must be vacated and corrected. The Apprendi and now the Blakely decisions of the Court make it clear that these are basic liberty rights of all citizens that must be respected and protected. I do not argue that the Federal Sentence Guidelines are themselves unconstitutional. Rather I claim that the method of implementation in arriving at my sentence was unconstitutional in that the court increased my sentence based upon statements contained in a debriefing interview of a government informant. This person testified at trial and made no mention of the additional claimed transactions during his testimony. I was therefore deprived of my right to confront and examine him as to these claimed transactions.No attempt was made to have the jury make any determination as to the weight of the drugs involved. At the time of sentence the court accepted this proffer of the debriefing, which probably also violated the Crawford decisions and guidelines , and used the significantly increased claimed weight as the basis for my sentence which significantly increased the term of my imprisonment.

My case was tried before a jury after Apprendi but-before Blakely . The court was therefore aware of the Supreme Courts dictates in APPRENDI and should have disregarded the additional claims of transactions not testified to by the witness at the time of trial.

U S A v. JOSE MEDINA

The sentence imposed should be vacated and corrected. Sentence should be imposed within the Guidelines in effect at the time of the alledged transactions based solely upon the weight of the substances testified to at trial. Since the jury was not requested to make a finding as to the weight of drugs involved beyond a reasonable doubt after hearing evidence I also claim that the sentence should be reduced to the base level without any increase based upon the weight of the substances.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * * * * * *
UNITED STATES OF AMERICA *

* * * * * * * * * * * * * * *
VS. *

CRIMINAL ACTION
No. 99-10140-GAO

JOS MEDINA *

OTONIEL MEDINA *

* * * * * * * * * * * * * * *

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.,
UNITED STATES DISTRICT JUDGE, and a jury
DISPOSITIONS
August 9, 2000

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE, (By Heidi Brieger
and John Wortmann, Assistant United States Attorneys),
One Courthouse Way, 9th Floor, Boston, Massachusetts
02210, on behalf of the government

LAW OFFICE OF PAUL J. HALEY, (By Paul J. Haley,
Esq.), 460 West Main Street, PO Box 1868, Hillsboro, New
Hampshire 03244, on behalf of Jose Medina

PAUL YEE, ESQ., 52 Temple Place, Boston,
Massachusetts 02111, on behalf of Otoniel Medina

Courtroom No. 3
1 Courthouse Way
Boston, Massachusetts 02210

Jill K. Ruggieri, CSR, RPR, RMR, FCRR, CRR
Official Court Reporter
3510 Courthouse Way
Boston, Massachusetts 02210
(617) 428-0011

Multi-Page™

Page 6	Page 8
<p>1 Mr. Giargiari was saying, which was that Mr. Medina had 2 large quantities of cocaine available at the other end of a 3 phone call.</p> <p>4 THE COURT: Did Mr. Giargiari testify at trial 5 to the quantities that are in the memo, all of them?</p> <p>6 MS. BRIEGER: I believe --</p> <p>7 THE COURT: In particular, for example, the -- 8 set forth in Paragraph 3 and maybe Paragraph 4 as well.</p> <p>9 MS. BRIEGER: I don't think he did, your 10 Honor, because I think we offered testimony primarily 11 forward from December 9, although Mr. Giargiari did testify 12 that he had been a regular cocaine customer of Mr. Medina.</p> <p>13 And, frankly, that is why Mr. Giargiari is here 14 today, because the government would propose to offer that 15 testimony and permit cross-examination or permit the Court 16 to examine him on that very issue.</p> <p>17 I think it's appropriate in this case that simply 18 because the trial testimony doesn't reflect the 19 pre-December 9th purchases, that that <u>not</u> be subtracted out 20 of the sentencing calculation because that calculation is a 21 particularly important reflection of the scope of 22 Mr. Medina's drug trafficking.</p> <p>23 THE COURT: Is it the government's proffer 24 that if called to testify here today he would testify 25 consistently with the memorandum?</p>	<p>1 calculated.</p> <p>2 THE COURT: Well, if the proposition is that 3 the sentencing hearing is limited to the evidence produced 4 at trial, I think that's wrong and I wouldn't so limit it. 5 The question is if that limit doesn't apply, is 6 there reason to reject the government's numerical 7 computation either because of the adequacy of the evidence 8 or otherwise. And, in particular, there is an offer to call 9 the witness, and I guess if the government proffers it, it, 10 in a sense, makes an offer of proof that that's what he 11 would say.</p> <p>12 If you doubt it would come out that way on 13 examination, then we could call him and --</p> <p>14 MR. HALEY: No, your Honor. I don't doubt 15 what he would say. I don't doubt the offer of proof made by 16 the government.</p> <p>17 What I'm saying is that offer of proof contradicts 18 what he's already testified to at the trial. That's what 19 I'm suggesting.</p> <p>20 THE COURT: I see.</p> <p>21 MR. HALEY: And so on that basis, the 22 government fails in its burden, even by a preponderance of 23 the evidence, to a calculation other than that which was 24 calculated by the Probation Department.</p> <p>25 THE COURT: Ms. Briege.</p>
Page 7	Page 9
<p>1 MS. BRIEGER: Absolutely.</p> <p>2 THE COURT: All right.</p> <p>3 Mr. Haley.</p> <p>4 MR. HALEY: Your Honor, I would -- your Honor 5 was present for the trial testimony. I believe 6 Mr. Giargiari testified that from the period between 1996 7 and December of 1998, that Jose Medina was around very 8 little, and there was other testimony that he was out of 9 state. He was in Florida.</p> <p>10 The trial evidence did not demonstrate any regular 11 practice with Mr. Giargiari, or that there was any 12 transactions -- specific transactions.</p> <p>13 He also testified -- excuse me, your Honor.</p> <p>14 He also stated on December 10 in an interview with 15 Detective Sergeant Slattery -- and it's in Sergeant 16 Slattery's report, and I refer to my memorandum on that, 17 your Honor -- that he purchased drugs on December 9 from a 18 person named Jay at Hoyts Theater in Westborough.</p> <p>19 In addition, your Honor, there was other testimony 20 from a witness, Vazquez, whose testimony contradicted 21 Mr. Giargiari regarding drug amounts.</p> <p>22 So I would say, your Honor, that based on the trial 23 testimony and even based -- the evidence should not be 24 considered by this Court at this time in determining the 25 calculations beyond what the Probation Department has</p>	<p>1 MS. BRIEGER: Your Honor, the only thing I can 2 add to that is that on Page 4 of the revised presentence 3 report is the original offense conduct that the government 4 submitted which puts into a little more detail the 5 quantities that Edward Giargiari said that he bought from 6 Jose Medina and it actually adds it up. And by the end of 7 the March 30th transaction, it's, by my count, 4,466 or so 8 grams.</p> <p>9 So the government has --</p> <p>10 THE COURT: You're referring to the numbers in 11 Paragraph 5 on Page 4?</p> <p>12 MS. BRIEGER: Correct, correct.</p> <p>13 THE COURT: Okay.</p> <p>14 I'm going to sustain the government's objection to 15 the presentence report. I think that the government 16 proposes an accurate computation and that the amount 17 attributed should be in excess of 4 kilograms. I think 18 there is a substantial basis for that in the record that I 19 have, which includes the proffer by way of the --</p> <p>20 I would note I do not think that there was a 21 substantial inconsistency in the testimony, the trial 22 testimony, with this report. There was some generalized 23 consistency in that my recollection is that Giargiari 24 testified to an extended course of transactions in smaller 25 amounts than the ones that were actually in issue on some</p>

Multi-Page™

Page 14	Page 16
<p>1 government's position, his maximum would have doubled. And 2 also, it's a \$1 million fine. His maximum fine would have 3 doubled to 2 million. And with respect to the supervised 4 release, it's -- it would be at least three years or only 5 three years' supervised release.</p> <p>6 That would be a punishment that would be increased 7 under the minimum mandatory section; and as I pointed out, 8 under C, there is no minimum mandatory.</p> <p>9 So it does matter to Otoniel Medina if Apprendi or 10 Jones applied in this particular case.</p> <p>11 The government does cite one Eighth Circuit case in 12 its brief that if this Court doesn't sentence over the 13 20-year sentence, Apprendi does not apply. What I would 14 suggest to the Court on behalf of Mr. Medina is that that's 15 not the correct interpretation. The correct interpretation 16 would be that if his maximums were jacked up, Apprendi and 17 Jones would apply in this particular instance.</p> <p>18 Also, Justice Thomas and Justice Stevens in the 19 Apprendi and the Jones case respectively have remarked in 20 concurring opinions that if the minimum mandatories were to 21 apply, then the government would be obligated as a matter of 22 constitutional law to allege an indictment, what the drug 23 quantity was, and also prove that drug quantity beyond a 24 reasonable doubt.</p> <p>25 The government relies and there is some -- there is</p>	<p>1 if we look at this drug law, 841, that really you have 2 separate, distinct crimes in (b) and (c).</p> <p>3 And the reason I would suggest that to the Court is 4 that if you look at the two Supreme Court cases on the 5 federal statute, on the car-jacking and on the firearms, the 6 using a firearm in a crime of violence, the Court has 7 indicated that each of those statutes, even though it says 8 or could be interpreted that those are sentencing 9 enhancements, you read each of those as separate crimes and 10 it has to be played out separately.</p> <p>11 So you have -- you have the Jones case and you also 12 have the Castillo cases that I cite in my memorandum 13 concerning the two federal statutes that the Supreme Court 14 has looked at, and in both those instances, the Supreme Court 15 says if you look at it, they're really separate 16 crimes.</p> <p>17 And what I would suggest on behalf of Mr. Medina is 18 that (c) and (b) are separate crimes, just as in Castillo 19 and Jones.</p> <p>20 So if -- and if the government doesn't specify 21 where it's really applying, then it ought to default to the 22 20-year part which is under 841(b)(1)(C), which is the 23 20-year.</p> <p>24 You apply the 20 years; there's no minimum 25 mandatory. If the Court does find this kilogram of</p>
Page 15	Page 17
<p>1 that open case of McMillian v. Pennsylvania that both briefs 2 allude to that permits a minimum mandatory within a certain 3 statutory range.</p> <p>4 McMillian is different from this particular case. 5 The reason McMillian is different from this particular case 6 is that McMillian was a Pennsylvania state law. It's drafted 7 very, very differently than 841. In -- within that statute 8 it says that if a person is carrying a gun, it is a 9 sentencing factor, not an element.</p> <p>10 And also, the Supreme Court seems to indicate in 11 Apprendi that, if called upon, the Supreme Court would 12 revisit McMillian because the holding in Apprendi is that any 13 sentencing fact other than a prior conviction must go to the 14 jury and be pled by the government.</p> <p>15 So McMillian is what I suggest is a tenuous argument 16 for that. And also I think the way McMillian would be 17 applied to be consistent here, your Honor, is that -- say if 18 under 21, Section 841(b)(1)(C), if there were a minimum 19 mandatory sentence in that section of the law and then the 20 Court were to apply the minimum mandatory within the 20 21 years, I think then the government's argument would be 22 correct.</p> <p>23 What the government is asking the Court to do is go 24 into another section of 841, and apply that part which has 25 increased minimums and maximums. And I would suggest that</p>	<p>1 cocaine by preponderance of the evidence and Mr. Medina 2 would be subject to a Level 26, without a minimum mandatory, 3 would be subject to a three-year supervised release, not a 4 four-year supervised release, as 841(b)(2) mandates.</p> <p>5 The last issue I wish to address the Court on with 6 respect to the Apprendi/Jones issue is that the notice of 7 applicability in this case really is irrelevant.</p> <p>8 With respect to notice of applicability, it's only 9 applicable to prior convictions under 21 USC 851(a), your 10 Honor.</p> <p>11 And if the government wished to have an increase or 12 enhanced penalty, the government ought to give notice of the 13 prior convictions. And in there it doesn't even say if the 14 government wished to have increased penalties or 15 enhancement, that it must give the drug quantity. It only 16 talks about prior conviction.</p> <p>17 So if you go back to Apprendi and Jones, even 18 though the government gave notice of applicability, which I 19 don't think is relevant here, it still doesn't pass muster 20 with Jones and Apprendi because it wasn't alleged. There 21 was no jury instruction, and it didn't go to the jury for 22 that increase/enhancement.</p> <p>23 Just one moment your Honor.</p> <p>24 (Pause in proceedings.)</p> <p>25 MR. YEE: That, in summary, is the</p>

Page 22

1 Simons was a general manager of a family-owned business
 2 named Crazy Bob's that he ran with his father. And in that
 3 particular case, this Court gave Mr. Simons a minus for
 4 minimal participant.

5 So even though it's family and if it's part of some
 6 alleged organization, that person can still get a minimal
 7 participant role reduction.

8 And, in fact, Mr. William Simons in that case did.

9 I would suggest in this particular case, the trial
 10 testimony, the trial evidence, would suggest that Mr. Medina
 11 was at the periphery. He was there. Mr. Giargiari
 12 testified -- and I annexed his testimony here -- that he was
 13 present when Jose Medina delivered and sold drugs to
 14 Mr. Giargiari, was there just talking to his brother.

15 He was asked directly by the government did he
 16 recall any time when Otoniel Medina delivered drugs or sold
 17 drugs to him. He says no.

18 So Mr. Medina, with respect to that, he was just
 19 there.

20 With respect to Janine Soldicich, she testified
 21 that there was extensive dealing with Jose Medina but that
 22 Otoniel Medina was only four or five -- was there only four
 23 or five times, and that's borne out by the portion of the
 24 transcripts that I have annexed, your Honor.

25 He was not a person that was an integral part of

1 presented to this Court. And the DiMarzo case, a brother --
 2 the brother actually drove the negotiating brother to the
 3 scene of the transaction -- this is on Page 5 of my
 4 supplemental memorandum -- and then stayed in the parking
 5 lot, acted as a lookout. The other brother went to the
 6 agent, negotiated, waited for the courier.

7 The driver brother also rented a room to overlook
 8 the parking lot to be as a lookout. And in that particular
 9 case, the district court provided a minus two role reduction
 10 and he was sustained.

11 He had argued that it should have been a minimum
 12 role reduction, and the First Circuit stated that the
 13 district court was correct.

14 So I think in this particular case, he was not a
 15 lookout. He didn't fit any of the things that what even the
 16 defendant in the DiMarzo case did, your Honor. I think that
 17 as a result of that, he should get at least a three -- get
 18 at least a three or four, your Honor, as a role reduction.

19 THE COURT: Ms. Briege.

20 MS. BRIEGER: Your Honor, I have -- again,
 21 this is something that was addressed in our sentencing memo.

22 I think that the trial evidence here is that
 23 Mr. Otoniel Medina was second banana to his brother.

24 There's no question about that. The fact that he was second
 25 banana to his brother, however, doesn't automatically make

Page 23

1 this so-called conspiracy. He was on the periphery. And I
 2 would suggest that he did not arrange any of these
 3 transactions. The testimony was consistent that Giargiari
 4 or Soldicich would call the pager. It was Jose Medina that
 5 responded to the pager or delivered the drugs. He was not
 6 that type of person who arranged.

7 Further, there was no testimony that -- and I
 8 think, again, the government misstates what the trial
 9 evidence was.

10 There was no testimony or evidence that he paid
 11 Josue Vazquez or that he paid Jose Ortiz or that he paid
 12 Junior Camarena. There was just no testimony as to that,
 13 your Honor.

14 There was no testimony that he arranged those
 15 transactions. There was no testimony that he even acted as
 16 a middle person between other people as an arranger. He was
 17 just -- none of that testimony in this case.

18 He is really a minimal participant. And if he were
 19 not a minimal participant, he should at least get a minus
 20 three and between minimal and minor.

21 And if you look -- also, I think at the very least,
 22 he should get a minor. And I cited a case in my
 23 supplemental memo which is the DiMarzo case, your Honor.
 24 And in that particular case, it was two brothers and the
 25 First Circuit was faced with this very question that is

1 him a minor participant or even a minimal participant,
 2 particularly when you look at the nature of the activity
 3 they were both engaged in.

4 And whenever a defense lawyer suggests that I have
 5 misstated the evidence, that is a serious accusation, and I
 6 want to make clear that the government did not misstate the
 7 evidence; that Mr. Otoniel Medina did, in fact, take money
 8 from workers and did give drugs to workers and did pay
 9 others.

10 And if the Court looks at the testimony offered by
 11 Josue Vazquez on April 10, the question was:

12 Did you ever get cocaine from anyone else?
 13 Yes, two or three times from his brother, Oto
 14 Medina.

15 Can you describe those situations?

16 Jose Medina was either out of town -- Jose Medina
 17 was out of town and his brother, his brother would just tell
 18 me where to go and how much to deliver.

19 A few questions later:

20 What did you do with the money on those occasions?
 21 Brang it right back to the house.
 22 And who did you give it to?
 23 Oto Medina.
 24 Mr. Jose Ortiz testified to exactly the same thing.

25 He was asked:

Page 25

Page 30	Page 32
1 when his brother went to these various drug transactions was 2 he could be there, he could be with his older brother. That 3 was the only benefit. 4 He did not receive any monetary benefits -- this is 5 Page 3, the last paragraph -- at all. There was no 6 splitting of huge profits. I would suggest that the 7 government is asking this Court really to speculate where 8 there's no evidence in order to draw that reasonable 9 inference that there were huge profits or that both brothers 10 split any of these profits between themselves, your Honor. 11 And I would also ask the Court to review that 12 proffer statement in light of his role reduction and 13 consider that because basically after September '98, he was 14 not part of anything. And I think, you know, that's why you 15 didn't hear about him at all. With respect to the testimony 16 of Josue Vazquez, Mr. Medina would suggest it's not truthful 17 at all. He lied or he was inconsistent in many respects 18 with other witnesses. 19 He did not state that he was working with Howie 20 during the relevant times here. He denied that he knew this 21 person named Howie. 22 Jose Ortiz in his testimony, your Honor, stated 23 that, in fact, Junior -- Josue Vazquez had been living down 24 in Rhode Island, and Mr. Vazquez denied that. He denied he 25 knew this person named Howie.	1 THE COURT: Well, okay. 2 MS. BRIEGER: Briefly, your Honor, it's 3 critical that Josue Vazquez's testimony that he worked for 4 Jose Medina from September of 1998 until December of 1998, 5 four months -- during those four months, Otoniel Medina was 6 involved with his brother, paid Josue on several occasions 7 and collected proceeds of the transactions. 8 When Mr. Josue Vazquez left the conspiracy in 9 December of 1998, it is also fair to assume that the vacancy 10 was filled by Oto Medina. And, in fact, who is it that has 11 a kilo of cocaine in his hands on March 30 but Oto Medina. 12 So it's really a fantasy to suggest that Otoniel 13 Medina had withdrawn from the conspiracy as of 14 September 1998. 15 THE COURT: Okay. 16 To resolve the fact issue, based on the evidence at 17 the trial, I would find, and I do find, that Oto Medina was 18 an active and regular participant in the conspiracy and the 19 work of the conspiracy, even though, as the government has 20 pointed out, to a lesser prominence, perhaps, in the 21 activity of the conspiracy than his brother was but, 22 certainly an active and regular participant. 23 And even if there were periods of his inactivity, 24 there is no doubt he was present at the end, as well as 25 toward the beginning, because he was an active participant
Page 31	Page 33
1 In Mr. Otoniel Medina's safety valve statement, he 2 states the role of Josue Vazquez on Page 2, your Honor, and 3 Josue Vazquez told him directly that he was -- he had been 4 working down in Rhode Island for four to six months and that 5 he had been stopped -- for Howie -- and that he had been 6 stopped by the police on two occasions. And that's why he 7 came back to Massachusetts, and that's why he hooked up with 8 Jose Medina. 9 When Josue Vazquez was in the picture, obviously 10 there was no need for Otoniel Medina to be in the picture at 11 all, and that's what happened, your Honor. He was not in 12 the picture that point in time. He was not there in 13 December when this alleged transaction happened. 14 Josue Vazquez even testified that the December 9 15 transaction of the quarter kilo, Otoniel Medina was not 16 present. He was present with Jose Medina. 17 So it is consistent with what Otoniel Medina is 18 proffering to this Court under the safety valve, that he, in 19 fact, did leave this conspiracy in September of 1998. 20 And if you look at Josue Vazquez's testimony, he 21 said he worked with Jose Medina from September '98 through 22 December '98. So that is consistent, your Honor, that is 23 consistent, and it is the truth. 24 Mr. Vazquez is not telling the truth to this Court, 25 your Honor.	1 in the events of March 30 as anybody. 2 Certainly with respect to the focus on that event, 3 he was not a minor participant. I think that's the event -- 4 I don't have the indictment in front of me, but I believe 5 that's the end charge in Count 2 of the indictment. 6 So with respect to that -- so I don't think the 7 enhancement -- the reduction for a minor role is appropriate 8 in this case. 9 Let me just say I think the summary of the activity 10 of the offense that's contained in the presentence report is 11 accurate. 12 I have one very minor question about it, which I 13 think is immaterial in light of the general findings, but 14 let me just ask, particularly Ms. Brieger, if you would look 15 at Paragraph 7 of the presentence report, Page 5 -- 16 MS. BRIEGER: Yes, your Honor. 17 THE COURT: -- which includes Otoniel Medina 18 at the Hoyts Cinema on the 9th, was there evidence to that 19 effect? I don't remember. 20 MS. BRIEGER: There was evidence, your Honor. 21 The evidence was from Josue Vazquez that Otoniel Medina was 22 there with him. And I believe there was evidence from 23 Edward Giangianni that he couldn't remember -- oh, I'm sorry. 24 Giangianni testified on April 5 in response to a 25 question: Did you meet at Hoyts Cinema?

Page 38	Page 40
1 get the two points which would bring the range below the 2 five -- okay. I think it is not appropriate to invoke the 3 safety valve provision for Mr. Otoniel Medina. 4 Okay. Now, I think that brings us to the final 5 issues of what the proposed sentence -- What the recommended 6 sentences are from the various parties. And I know Mr. Yee 7 has a request for a departure which I'll hear as part of the 8 presentation of what the sentence ought to be, so let me 9 hear first from the government as to its recommendations in 10 each case.	1 lives of his family and friends who are in the courtroom 2 with him here today. 3 I ask your Honor to take this into consideration, 4 and I would ask your Honor to specifically in the sentencing 5 order recommend his participation in the 300-hour drug 6 program. And I would ask your Honor in light of the fact 7 that his family is in the Framingham, Massachusetts, area 8 that he -- that a recommendation be made that he be sent to 9 Fort Devens, Massachusetts.
11 MS. BRIEGER: Your Honor, with respect to the 12 defendant Otoniel Medina, the government, in recognition of 13 the guideline ranges that the Court has found, suggests that 14 he be sentenced at the low end of the applicable guideline 15 range, which I believe is 63 months, and a five-year term of 16 supervised release and leave the fine to the discretion of 17 the Court based on the information in the presentence 18 report.	10 Thank you. 11 THE COURT: Mr. Medina himself has the 12 opportunity to say something if he wishes. You don't have 13 to if you don't want to.
19 THE COURT: And with respect to Jose Medina? 20 MS. BRIEGER: With respect to Jose Medina, 21 your Honor, again, in recognition of the findings that the 22 Court has made on the guideline ranges, and, again, in 23 respect for the quantity of time involved here, I think that 24 it should be clear that the government's recommendation is 25 one which is fair and just and is arrived at after taking	14 MR. HALEY: He does not wish to, your Honor. 15 THE COURT: All right. 16 Mr. Yee, then, on behalf of Otoniel Medina. 17 MR. YEE: Although I didn't argue the safety 18 valve, I object to the Court's ruling. 19 THE COURT: Okay. 20 MR. YEE: And save Mr. Medina's rights. 21 With respect to -- 22 THE COURT: I think it was -- let me just note 23 I think it was adequately presented in the papers to 24 preserve any rights, but if it wasn't your rights are saved. 25 MR. YEE: Thank you very much, your Honor.
1 the most conservative calculations possible and suggesting 2 the most conservative calculations to the Court, that he be 3 sentenced at the low end of his applicable guideline range 4 which is 121 months and at least a five-year term of 5 supervised release, a fine left to the discretion of the 6 Court and payment of the mandatory special assessment. Of 7 course that applies to Otoniel Medina as well. 8 THE COURT: Mr. Haley. 9 MR. HALEY: If I might, your Honor. 10 Your Honor, clearly Jose, Jose Medina is facing a 11 very significant sentence based on the base offense level of 12 32. I would suggest, your Honor, that the sentence serves a 13 dual purpose. It serves to punish and it serves, hopefully, 14 to rehabilitate. 15 Certainly, your Honor, if you look out in the 16 courtroom today, he's got a tremendous support structure. 17 He's got family and he's got friends and he's got clergy who 18 care very deeply about him, who will stick with him 19 through this and through the years that he's incarcerated. 20 I would ask your Honor to go along with the 21 government's recommendation at the low end. 22 Your Honor, he developed a drug problem with 23 marijuana sometime in his early teen years and somehow kept 24 going on a left-turn direction with regard to drugs. 25 Certainly drugs have affected his life and have affected the	Page 39 1 I think Apprendi still applies, your Honor, because 2 we have requested a downward departure under SK2.0 for 3 aberrant behavior and we supplied -- there's probably at 4 least 30 pages of letters and petitions that were submitted 5 to the Probation Department when the probation report was 6 made, and there were people who -- family members, people 7 who are friends, who are acquaintances, who are church 8 members, who have known Otoniel Medina and also Jose Medina 9 for substantial periods of time, and there are people who 10 have known these two young men for 13 years, nine years, and 11 the like, your Honor. 12 I think that -- I think the -- these letters and 13 petitions and the like really support a particular argument, 14 his contention that it is aberrant behavior in this 15 particular instance and it was a marked departure from the 16 past and that it's not likely to occur in the future. 17 If you look at some of the recommendations, some of 18 the letters about Otoniel Medina, such as Iglesia Galvis, 19 that's his sister, she says, My brother has made some 20 mistakes in his life but has learned the consequences of it. 21 Oto Medina has changed a great deal. 22 If you look at Antonio Ortiz's letter dated May 11, 23 2000, he's known both of them for several years. He stated 24 that Oto Medina was always the quiet one. 25 If you look at Ilana Delgado's, dated May 15,

Page 46

Page 48

1 opportunity to make a statement before sentence is imposed,
 2 if you wish. You don't have to if you don't want to.
 3 DEFENDANT OTONIEL MEDINA: Thank you, your
 4 Honor.

5 THE COURT: Do you want to respond to the
 6 departure argument?

7 MS. BRIEGER: I would, and I'll make it very
 8 brief, your Honor.

9 Mr. Haley mentioned that Congress's drug sentencing
 10 scheme is designed to both punish and rehabilitate, but what
 11 he didn't mention is that it's also designed to deter crime
 12 by others.

13 And it's critical that despite this remarkable
 14 outpouring by this number of people who've come to show
 15 their support for these defendants, that they realize that
 16 people like Janine Soldicich, Josue Vazquez, Eddie
 17 Ciargiari, Jose Ortiz, all of whose lives have been
 18 affected, "left-turned," as Mr. Yee would say, by conduct of
 19 these two defendants. Those are four out of innumerable
 20 defendants -- innumerable people whom these defendants sold
 21 cocaine to who are not here today and cannot speak for the
 22 harm that has been caused in their individual lives.

23 And I hope on behalf of the government that
 24 whatever sentence this Court imposes, that it sends to all
 25 of the people who live in the metrowest region a message

1 pursuant to the Sentencing Reform Act of 1984, it is the
 2 judgment of the Court that you, Jose Medina, be, and you
 3 hereby are, committed to the custody of the Bureau of
 4 Prisons to be imprisoned for a term of 121 months. The term
 5 consists of terms of 48 months on each of Counts 3 and 4 and
 6 121 months on Counts 1, 2 and 5, all terms to be served
 7 concurrently.

8 Upon your release from imprisonment, you shall be
 9 placed on supervised release for a term of four years.
 10 Again, this consists of terms of four years on Counts 1, 2
 11 and 5, and terms of one year on Counts 1, 3 and 4, all to be
 12 served concurrently.

13 Within 72 hours of your release from the custody of
 14 the Bureau of Prisons, you shall report in person to the
 15 district to which you've been released.

16 While you're on supervised release, you shall not
 17 commit any other federal, state or local crime.

18 You shall refrain from the unlawful use of any
 19 controlled substance and in that respect shall submit to one
 20 drug test within 15 days of your release. And at least two
 21 periodic drug tests thereafter, as may be directed by the
 22 Probation Office.

23 You shall comply with the standard conditions for
 24 supervised release prescribed in the sentencing guidelines
 25 at Section 5D1.3(c) and in addition the following special

Page 47

Page 49

1 that they should think not once, not twice, but three times,
 2 at least, before they buy or sell or use drugs.

3 And I think that it's critical that that is part of
 4 what the government is doing, and it's the part of what
 5 Congress intended the government to do in enforcing the drug
 6 laws.

7 THE COURT: Well, I decline to depart from the
 8 sentencing guideline range because I do not think that the
 9 case qualifies for the aberrant behavior ground or any other
 10 ground that occurs to me.

11 I do want to make it clear that my declining to
 12 depart is not based on the existence of a mandatory minimum
 13 which would interfere with that but on the ground that there
 14 is not a satisfactory reason under §3552 to depart.

15 Otherwise, I think it is appropriate to impose
 16 sentences in each case at the low end of the guideline
 17 range. The guidelines require me to state when the range is
 18 greater than 24 months the reason for locating it outside or
 19 where in the range I'm locating it, and that applied to the
 20 sentence for Jose Medina, and I think that in the case a
 21 sentence at the low end, which is slightly in excess of ten
 22 years, is, under all the circumstances, an appropriate
 23 sentence and more need not be imposed.

24 So first Jose Medina, if you'd stand, please.
 25 Upon your conviction of these offenses, and

1 conditions:

2 You are prohibited from possessing a firearm or
 3 other dangerous weapon;

4 you shall participate in any program for substance
 5 abuse that may be directed by the Probation Office, which
 6 program may include random testing to determine whether you
 7 have reverted to the use or abuse of alcohol or drugs;

8 you shall be required to contribute to the costs of
 9 services for such treatment based on your ability to pay or
 10 based upon the availability of third-party payment.

11 In view of the financial circumstances as reported
 12 in the presentence report, I will impose no monetary fine.

13 There is a special assessment for \$100 for each of
 14 the counts of conviction for a total of \$600.

15 I will add a judicial recommendation to the Bureau
 16 of Prisons that the defendant be considered for the 500-hour
 17 drug program. And I will recommend, particularly in light
 18 of the obvious close ties with family members, that he be
 19 housed as close to the family as may be consistent with the
 20 Bureau policies.

21 MR. HALEY: Thank you, your Honor.

22 THE CLERK: Mr. Jose Medina, the Court hereby
 23 notifies you of your right to an appeal. If you are unable
 24 to pay the cost of an appeal, you may apply to the Court to
 25 allow you to appeal without paying cost.

Page 54

C E R T I F I C A T E

I, Jill K. Ruggieri, Official Court Reporter for
the United States District Court for the District of
Massachusetts, do hereby certify that the foregoing pages
are a true and accurate transcription of my shorthand notes
taken in the aforementioned matter to the best of my skill
and ability.

JILL K. RUGGIERI, CSR, RPR, RMR, FCRR, CRR
Official Court Reporter
1 Courthouse Way, Suite 3510
Boston, Massachusetts 02210
(617) 428-0011

recovered cocaine." 83 F.3d at 493.

Finally, here, yet again as in *Jiminez Martinez*, the district court failed to articulate any reason why it concluded that the debriefing report was reliable. Or, for that matter, as we have seen, pp. 11-12, *supra*, whether it relied on it at all. Thus, it failed to comply with the statutory injunction that it "state in open court the reasons for its imposition of the particular sentence...." 18 U.S.C. 3553(c).

As this Court said in *Sepulveda*, *supra*, although the Government need only prove drug quantity by a preponderance of the evidence, that burden

"must be sedulously enforce[d] ... for under the guidelines, drug quantity has a dramatic leveraging effect.... relatively small quantitative differences may produce markedly different periods of immurement." 15 F.3d at 1198.

Here, the result of the district court's acceptance of the debriefing report at face value -- which, at best, is what it did -- resulted in Medina's becoming vulnerable to the 121 months of incarceration he received, as compared to the 79-87 months he would have been exposed to otherwise. U.S.S.G. Chapter 5, Part A (sentencing table).

III. THE FAILURE OF DEFENDANT'S COUNSEL AT SENTENCING TO CHALLENGE THE DEBRIEFING REPORT ON THE ISSUE OF DRUG QUANTITY DENIED HIM THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Standard of Review

This Court has determined that the issue of effectiveness of

And, further, that "[Gargiari's] trial testimony was consistent with the evidence that he gave the agent immediately in December when he was arrested." TR (sentencing), at 5; Addendum, at 7.

Not until the following exchange did the Government concede that none of this was true:

"THE COURT: Did Mr. Gargiari testify at trial to the quantities that are in the memo, all of them?

"Ms. Brieger: I believe --

"THE COURT: In particular, for example, the -- set forth in Paragraph 3 and maybe Paragraph 4, as well.

"Ms. Brieger: I don't think he did your Honor, because I think we offered testimony primarily forward from December 9, although Mr. Gargiari did testify that he had been a regular cocaine customer of Mr. Medina...." TR (sentencing), at 6; Addendum, at 8.

The Government then stated that it had Gargiari available to testify at sentencing and that it was "absolutely" confident he would testify consistently with the debriefing report and sentencing memorandum.

Asked to respond to this crucial exchange between the district court and the Government, which exposed the Government as first overreaching in its assertions regarding the evidence at trial and then correcting itself, Medina's counsel, who did not represent him at trial, countered feebly: Gargiari's trial testimony, he said, was that Medina "was around very little" during the two year period in question, "and there was other testimony that he was out of state. He was in Florida." TR (sentencing), at 7; Addendum, at 8.

This was untrue: Gargiari never testified about Medina's whereabouts, let alone that he was around very little. Another Government witness, Jose Ortiz, did testify that Medina was in

whether counsel fell short of that standard:

"First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. at 687.

Judge Selya's opinion in *Scarpa*, *supra*, 38 F.3d at 10, wherein defense counsel demonstrated his lack of understanding of the elements of the offenses with which his client was charged, and of the recognized defenses thereto, is apposite here:

"Unless counsel brings these rudiments to the table, a defendant likely will be deprived of a fair 'opportunity to meet the case of the prosecution,'" citing *Strickland*, *supra, inter alia*, 466 U.S. at 685, "and, thus, will be placed at undue risk of having no effective advocate for his cause. Phrased another way, if an attorney does not grasp the basics of the charges and the potential defenses to them, an accused may well be stripped of the very means that are essential to subject the prosecution's case to adversarial testing."

Here Medina's counsel at sentencing revealed to prosecutor and judge alike, both of whom attended the trial, that he had not made the effort to grasp the real thrust of the evidence at trial, as it affected his client. Lacking an understanding of the evidence, it is not surprising that he declined the opportunity to cross-examine Gargiari.

Medina's counsel's failure to cross-examine Gargiari on the contradictions between his testimony at trial and the report of his debriefing was unjustifiable on any imaginable tactical ground and sufficed to undermine confidence that the outcome of Medina's sentencing was fair and just

After the interchange described above, the district court informed Medina's counsel that it considered the debriefing

in the report occurred? During a two or three month period in the fall of 1996? Or the fall of 1998? Both hypotheses are problematic. If Gargiari said all of this happened in 1996, how explain the large gap between 1996 and the controlled buys of 1998? On the other hand, if the year is 1998, the contradiction between Gargiari's trial testimony that he had only been buying small quantities for his own use from Medina and the reported large purchases is even more glaring. And, phrases such as "on up to 4 ounces," "on four to six occasions," "on six to eight occasions," cry out for cross-examination. When? Where? With whom? For how much? In the morning or the afternoon? Etc., etc.

As this Court held in *United States v. Ademaj*, 170 F.3d 58, 62 (1st Cir. 1999), citing and quoting *Scarpa*, *supra*, 38 F.3d at 12, denying Medina his right to have the Government's chief witness on the subject of drug quantity -- Gargiari -- cross-examined, falls into the category of one of those rare instances where the Court will presume prejudice to the defendant.

But we need not subject ourselves to such a demanding test. As this Court said in *Gonzalez-Soberal v. United States*, 244 F.3d 273, 278 (1st Cir. 2001), citing *Strickland*:

"prejudice exists in a particular case when there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is one 'sufficient to undermine confidence in the outcome.' *Id.* On one end, it is not enough to show that the errors had 'some conceivable effect on the outcome.' *Id.*, at 693, 104 S.Ct. 2052. Nor is it required, however, that the defendant prove that the errors were more likely than not to have affected the